Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

COMMENTS OF INTUIT INC.

Intuit Inc. ("Intuit") submits these comments in response to the Federal Communications Commission's (the "FCC's" or the "Commission's") Further Notice of Proposed Rulemaking ("FNPRM") relating to its regulations implementing the Telephone Consumer Protection Act of 1991 (the "TCPA"). Intuit is a leading provider of personal finance management, accounting, and tax preparation software and web-based services for individuals and small businesses. Intuit is committed to consumer privacy and applauds the Commission's efforts to provide consumers with tools to avoid unwelcome telemarketing solicitations.

In its FNPRM, the FCC seeks comment on the Do-Not-Call Implementation Act (the "Do-Not-Call Act"), which, among other things, requires the Commission to maximize consistency between its rules and the Federal Trade Commission's (the "FTC's") Telemarketing Sales Rule (the "TSR"). Specifically, the FNPRM seeks comment on how the goals and principles identified in the Do-Not-Call Act should affect the Commission's implementation of its rules and how it should harmonize the requirements of the Do-Not-Call Act with the Commission's statutory mandate under the TCPA.

The legislative record underlying the Do-Not-Call Act (the "House Report") notes that the legislation is an "important step toward a one-stop solution to stop telemarketing abuses."[1] The House Report stresses the importance of harmonizing the federal telemarketing laws with state laws in order to achieve a single, national do-not-call regulatory scheme. Moreover, the House Report expressly warns that, unless the Commission and the FTC take steps to address any inconsistencies in their rules, Congress will address such conflicts legislatively. Thus, the express legislative intent underlying the Do-Not-Call Act was to promote a "one-stop solution" to the regulation of telemarketing.

In order to achieve this objective, and in response to the Commission's request for comments, Intuit believes that the Commission should (i) clarify through regulatory pronouncement that the Commission's rules preempt state laws at least with respect to interstate telemarketing, and (ii) engage in inter-agency efforts to harmonize the Commission's rules with those of the FTC in a manner that preserves the flexibility recognized under the Commission's existing established business relationship exception.

A. The National Do-Not-Call Registry Should Preempt State Law.

Consistent with the legislative mandate set forth in the Do-Not-Call Act, any do-not-call list established by the FCC pursuant to the TCPA should be designed to provide consumers and businesses with a "one-stop solution." Accordingly, the FCC should exercise its authority to expressly preempt the application of state do-not-call laws. Such a measure is necessary in order to maximize consumer convenience and to avoid the confusion that will result from the existence of federal and state do-not-call registries. At the same time, the preemption of state do-not-call

[1] H. R. Rep., 108-8, at 3 (2003) (*hereinafter House Report*).

laws would result in the more efficient use of taxpayer money at both the federal and state levels, provide for more effective legal enforcement, and avoid the imposition of unnecessary burdens on businesses.

As a general matter, the effect of the Communications Act of 1934 (the Communications Act") is to preempt state regulation of interstate communications. The TCPA was enacted with this framework in mind and was clearly intended to preempt state law with respect to interstate telemarketing. In fact, in adopting the TCPA, Congress expressly amended Section 2(b) of the Communications Act to ensure that the FCC's regulation of telemarketing would not be undermined by the jurisdictional fence established under that section. Consistent with this approach, Section 227(e)(2) of the TCPA provides that, if the FCC establishes a do-not-call database, then "a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list or listing system that does not include the part of such single national database that relates to such State."[2] Thus, Congress intended that, in the event the FCC authorizes a national do-not-call list, a state must enforce its do-not-call obligations by requiring use of the segment of the list that pertains to that state rather than a separately maintained list.

As a result, Intuit believes that the establishment of a national do-not-call registry was intended to effectively preempt state do-not-call lists with respect to both interstate and intrastate telemarketing. In any event, the burden of harmonizing the national do-not-call registry with the operations of the more than thirty states that have established do-not-call lists means that, as a practical matter, the only way to ensure that the statutory mandate of Section 227(e)(2) of the

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[2] Section 227(e)(1) of the TCPA does state that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements" [emphasis added]. However, the ability of states to enact such laws is expressly subject to restrictions set forth in subsection (2) of Section 227(e).

TCPA will be satisfied is to eliminate state do-not-call lists and replace them with a single national do-not-call registry. Intuit believes that preemption also is supported by established Communications Act jurisdictional principles, which recognize that state regulation may not encroach substantially on the Commission's authority under the Communications Act or frustrate the Commission in its exercise of jurisdiction over interstate and foreign communication services.[3]

At a minimum, however, Intuit urges the Commission through its rulemaking process to make clear that the TCPA continues to preempt state law with respect to *interstate* telemarketing. Such a regulatory pronouncement would eliminate the confusion that currently exists with respect to the applicability of state do-not-call laws to interstate telemarketing campaigns.

B. The FCC Should Work with the FTC in Harmonizing its Established Business Relationship Exception and Predictive Dialer Rules.

Consistent with the Do-Not-Call Act, the Commission should engage in inter-agency efforts with the FTC to harmonize its rules relating to the TCPA. In particular, the FCC should not simply adopt a revised established business relationship exception that is identical to the one adopted by the FTC. Unlike the FCC's current rules, the time-based restrictions and purchase requirements of the TSR's established business relationship exception[4] fail to accommodate the variety of relationships established and communications media employed by software companies and web based service providers.

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[3] *See North Carolina Utilities Com. v. Federal Communications Com.*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (holding that the FCC acted reasonably when it ruled that state regulatory agencies could not adopt regulations to restrict or prohibit the interconnection of customer-provided equipment to telephone facilities that were used for both interstate and intrastate communications).

[4] 16 C.F.R. § 310.2(n).

An established business relationship exception based on artificial, temporal restrictions unfairly disadvantages certain types of companies. Unlike credit card companies and other businesses that invoice customers monthly, purchasers of software may not make repeat purchases until three or four years later. In fact, Intuit's personal finance products, such as Quicken®, often are used for several years before the user upgrades to a newer version. However, under the FTC's established business relationship exception it may be unlawful for Intuit to telephone that user even when the user previously has registered a preference to be contacted by telephone.

Intuit believes that the Commission's current definition of an established business relationship, which relies on the existence of a voluntary two-way communication, provides a far more workable standard that recognizes the variety of relationships that companies, such as those in the software and web services industries, may have with their customers. As a result, Intuit urges the Commission to work with the FTC to recognize through joint administrative action additional exceptions to the established business relationship exception than those provided under the TSR. In this regard, Intuit notes that the House Report accompanying the Do-Not-Call Act specifically directs both agencies to take steps to make their rules as consistent and compatible as possible.[5] Thus, the Commission should not be required to simply defer to the position of the FTC under the amended TSR.

Finally, Intuit also urges the Commission to work with the FTC in its approach to the use of predictive dialing systems, which offer many benefits to consumers, including lower prices, fewer misdials, and improved quality controls. The abandoned call rate adopted by the FTC[6] is

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[5] House Report at 3.

[6] *See* 16 C.F.R. §§ 310.4(b)(1)(iv), 310.4(b)(4).

overly restrictive and the FTC, recognizing the burdens it will impose on businesses, already has postponed its effective date.[7] The Commission should work with the FTC to strike a better balance between consumers' interest in avoiding abandoned calls, on the one hand, and call center efficiency, on the other hand, by adopting a maximum abandonment rate of five percent Furthermore, any regulation mandating uniform acceptable abandoned call rates should expressly preempt individual state laws establishing such rates.

Respectfully submitted,

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[7] *See* Telemarketing Sales Rule: *Notice of Extension of Date By Which Full Compliance With Section 310.4(b)(1)(iv) and Section 310.4(b)(4) of the Amended Telemarketing Sales Rule Will Be Required Until October 1, 2003*, 69 Fed. Reg. 16414 (April 4, 2003).